J & D Masonry, Inc., and Pyramid Masonry Construction Co., LLC, Alter Egos *and* International Union of Bricklayers and Allied Craftworkers Local 9 Michigan, AFL–CIO. Cases 7–CA–47407 and 7–CA–47547

February 28, 2005

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 19, 2004, the National Labor Relations Board issued a Decision and Order[1] granting the General Counsel's Motion for Default Judgment and finding, inter alia, that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit, failing to furnish the Union with relevant and necessary information, and failing to continue in effect the terms and conditions of employment of the unit employees contained in its 2003–2005 collective-bargaining agreement with the Union.

However, the Board denied the motion with respect to the allegation that the Respondent had violated Section 8(a)(5) by failing to make "fringe benefit contributions" as required by the collective-bargaining agreement.[2] The Board stated that certain types of benefit funds are permissive subjects of bargaining for which no remedy would be warranted, and that there was no indication as to the nature of the funds involved in this case. The Board further stated that "[n]othing herein will require a hearing if, in the event of an appropriate amendment to the complaint, the Respondent again fails to answer, thereby admitting evidence that would permit the Board to find the alleged violation. In such circumstances, the General Counsel may renew the motion for default judgment with respect to the amended complaint allegations."[3]

Subsequently, on December 9, 2004, the General Counsel issued an amendment to the consolidated complaint, alleging that since about February 2004 the Respondent has failed to continue in effect the terms and conditions of employment of the unit contained in its 2003–2005 collective-bargaining agreement, including the following fringe benefit contributions for health and pension funds: the Michigan BAC health care fund, Michigan BAC pension fund, local pension, and international pension funds. The Respondent again failed to file an answer.

Accordingly, on January 11, 2005, the General Counsel filed a Motion for Default Judgment with the Board. On January 18, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the amendment to consolidated complaint affirmatively stated that unless an answer was filed on or before December 23, 2004, all the allegations in the amendment to consolidated complaint may be found to be true, pursuant to a motion for default judgment or pursuant to the Board's earlier Decision and Order in this case.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

Consistent with the allegations in the amendment to consolidated complaint, which have effectively been admitted by the Respondent's failure to file an answer, we find that since about February 2004 the Respondent has failed to continue in effect the terms and conditions of employment of the unit contained in its 2003–2005 collective-bargaining agreement, including the following fringe benefit contributions for health and pension funds: the Michigan BAC health care fund, Michigan BAC pension fund, local pension, and international pension funds.

The subjects set forth above relate to wages, hours and other terms and conditions of employment of the unit and are mandatory subjects of bargaining.

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[1] 343 NLRB No. 73.

[2] Id., slip op. at 2 fn. 2.

[3] Id. Member Liebman dissented, stating that she would have found that by failing to file an answer the Respondent had admitted all of the complaint allegations, including that the "fringe benefit contributions" contained in the parties' collective-bargaining agreement were mandatory subjects of bargaining. She therefore would have granted default judgment on this issue, and would have ordered the Respondent to make all the fringe benefit contributions contained in the agreement unless the Respondent showed in the compliance proceeding that any of the contributions were to fringe benefit funds considered to be permissive subjects of bargaining.

The Respondent engaged in the conduct described above without the Union's consent.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by, inter alia, failing and refusing since about February 2004 to make contributions to the Michigan BAC health care fund, Michigan BAC pension fund, local pension, and international pension funds as required by the parties' 2003–2005 collective-bargaining agreement, we shall order the Respondent to make all contractually required contributions that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 6 (1979).[4] The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, J & D Masonry, Inc., and Pyramid Masonry Construction Co., LLC, alter egos, Holt, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with International Union of Bricklayers and Allied Craftworkers Local 9 Michigan, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees performing construction work within the jurisdiction of the International Union of Bricklayers and Allied Craftworkers, as defined in the Constitution of the International Union, as well as all other work normally and traditionally assigned to and performed by employees represented by the International Union.

(b) Failing and refusing to furnish the Union with information that is relevant and necessary to the performance of its duties as the exclusive bargaining representative of the unit.

(c) Failing and refusing to continue in effect the terms and conditions of employment of the unit employees contained in the 2003–2005 collective-bargaining agreement by, inter alia, failing and refusing to make fringe benefit contributions to Michigan BAC health care fund, Michigan BAC pension fund, local pension, and international pension funds as required by the agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive representative of the unit employees.

(b) Furnish the Union with the information it requested on February 27 and March 8, 2004.

(c) Continue in effect the terms and conditions of employment of the unit employees contained in the 2003–2005 collective-bargaining agreement.

(d) Make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of its failure, since about February 2004, to continue in effect the provisions of the collective-bargaining agreement, including its failure to make the contractually required fringe benefit contributions, with interest, as set forth in the remedy section of this decision.

(e) Make all contractually required contributions to the Michigan BAC health care fund, Michigan BAC pension fund, local pension, and international pension funds that have not been made since about February 2004, and reimburse unit employees for any expenses ensuing from its failure to make the required contributions, with interest, in the manner set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an

[4] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Holt, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2004.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 28, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with International Union of Bricklayers and Allied Craftworkers Local 9 Michigan, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees performing construction work within the jurisdiction of the International Union of Bricklayers and Allied Craftworkers, as defined in the Constitution of the International Union, as well as all other work normally and traditionally assigned to and performed by employees represented by the International Union.

WE WILL NOT fail and refuse to furnish the Union with information that is relevant and necessary to the performance of its duties as the exclusive bargaining representative of the unit.

WE WILL NOT fail and refuse continue in effect the terms and conditions of employment of the unit employees contained in the 2003–2005 collective-bargaining agreement by, inter alia, failing to make fringe benefit contributions to the Michigan BAC health care fund, Michigan BAC pension fund, local pension, and international pension funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive representative of the unit employees.

WE WILL furnish the Union with the information it requested on February 27 and March 8, 2004.

WE WILL continue in effect the terms and conditions of employment of the unit employees contained in the 2003–2005 collective-bargaining agreement.

WE WILL make whole our unit employees for any loss of earnings and other benefits they may have suffered as a result of our failure, since about February 2004, to continue in effect the provisions of the collective-bargaining

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

agreement, including our failure to make the contractually required fringe benefit payments, with interest.

WE WILL make all contractually required contributions to the Michigan BAC health care fund, Michigan BAC pension fund, local pension, and international pension funds that have not been made since about February 2004, and reimburse unit employees for any expenses ensuing from our failure to make the required contributions, with interest.

J & D MASONRY, INC., AND PYRAMID MASONRY CONSTRUCTION CO., LLC, ALTER EGOS